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JUL 3 1944
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 217

RALPH KOPELOVE AND RALPH SCHEAR,
Petitioners,

vs.

JOE SHERMAN, MAX ROBINSON AND S. H. ROBINSON & CO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE AND BRIEF IN SUPPORT THEREOF.

WILBUR W. PIPER,
Counsel for Petitioners.

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JOE SHERMAN, MAX ROBINSON AND S. H. ROBINSON & CO.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

I.

Your Petitioners, Ralph Kopelove and Ralph Schear, respectfully pray for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Tennessee, being the highest court of the State, in the above entitled action, the opinion of said Court having been rendered and filed on January 8, 1944, order affirming and remanding the cause being filed February 5, 1944, petition for rehearing being filed January 18, 1944, within the time allowed by the rules of the Supreme Court of Tennessee, and said petition for rehearing, after being considered by the Supreme Court of Tennessee, was denied by

opinion filed March 4, 1944, and order entered in accordance with said opinion on March 7, 1944. This petition for certiorari, together with certified transcript of the record, are herewith filed in this Court, being within three months after denial of the petition for rehearing by the Supreme Court of Tennessee.

Summary Statement of Matters Involved.

(*a*) *The Pleadings.*

This was a suit in equity brought in the Chancery Court of Knox County, Tennessee, by Joe Sherman, a respondent, against Ralph Kopelove, a petitioner, and Max Robinson, as garnishee defendant, suit being filed November 7, 1942.

Sherman's suit claimed Ralph Kopelove, a non resident of Tennessee and a resident of Ohio, was indebted to him in the sum of $2650.00, $400.00 being salary for eight weeks from December, 1940, to February, 1941, when Sherman was employed by Kopelove, and $2250.00 being claimed as Sherman's one-half share of $4500.00 paid by defendant Max Robinson to Ralph Kopelove, as a member of the partnership composed of Sherman and Kopelove, known as Southern Materials Company, which operated at Lenoir City, Tennessee, reclaiming iron from a dump of Lenoir Car Works, Max Robinson having purchased from the partnership a release of a contract between them with Lenoir Car Works, so Robinson could make a new contract with the Car Works; the consideration of Robinson to the partners being the execution of a *note* for $4500.00, without interest, payable $500.00 per month; that Robinson had already paid defendant Kopelove $2000.00, $2500.00 remaining due, $500.00 being then due as of November 1st, 1942; that the note was made by Robinson payable to Kopelove; that Kopelove had failed and refused to pay

Sherman his one-half of the sale price already paid and Sherman asked for an attachment by garnishment to prevent Robinson from paying Kopelove the balance due. It was averred that complainant was entitled to an attachment by garnishment against Robinson, so Robinson might answer what he owed Kopelove, and that Robinson be enjoined from paying Kopelove the balance unpaid "on said note to the said Ralph Kopelove, doing business as Kopelove Iron and Metal Co.," pending settlement of this litigation, and it was averred that Sherman was entitled to an attachment against Kopelove, a non resident of Tennessee and a resident of Ohio.

The prayer asked for process to be served on Robinson, that publication be made for Kopelove, that Robinson be required to answer on oath whether he is, or was at the time of the garnishment, indebted to the defendant by note; if so, how and for what amount, etc.; the second prayer being that the effects, notes and debts in the hands of the garnishee in the name of Kopelove, be attached; there was a prayer for an injunction restraining Robinson from paying Kopelove; a prayer for a judgment of $2500.00, the amount owing by Robinson to Kopelove, and for $2650.00 if Kopelove entered his personal appearance (R. 1-5).

The Chancellor granted a fiat for writs of injunction and attachment (R. 5); subpoena to answer issued and was served on Max Robinson November 7, 1942; injunction was issued restraining Robinson from paying the debt mentioned in the original bill, etc., executed Nov. 7, 1942, and attachment issued, and the officer's return shows that it was not executed, and no writ of garnishment was ever issued or returned by the officer to the writ of attachment (R. 8-9). Non resident attachment notice was published, this publication notice not reciting the attachment of any property or execution of garnishment

(R. 9-10). This attachment notice merely recites that it appears from the original attachment bill that Ralph Kopelove was indebted to Sherman and was a non resident of Tennessee, and he was cited to appear on or before the third Monday of December next.

There were no further proceedings in the case until the amended and supplemental bill was filed by Sherman on March 1, 1943, neither Kopelove nor Robinson, the garnishee, answering or entering their appearance. The amended and supplemental bill referred to the averments of the original bill and that Robinson was indebted by note to Kopelove in the sum of $2500.00; and then recited that, when the original bill was filed, Sherman's counsel wrote Kopelove at Dayton, Ohio, advising him suit had been brought; that Kopelove and Schear and their attorney came to Knoxville Nov. 17, 1942, and stayed a few days; that Sherman was absent and the Ohio men communicated with Robinson for the purpose of making a settlement of the litigation, and none of them claimed the note was not still in the possession of Kopelove; that Kopelove did cheat Sherman out of his proper portion of the note and fraudulently attempted to transfer the note to Schear; that Schear had no interest in the note and his claim was to defeat Sherman's rights; that Schear, Kopelove and their attorney returned to Ohio and that Schear entered a confessed judgment against Max Robinson and S. H. Robinson & Co. as makers of the note for the sum of $2500.00 on November 20, 1942; and since then Schear has filed suit in the Second Circuit Court of Knox County, Tennessee, against Max Robinson and S. H. Robinson & Co., upon the confessed judgment in the Ohio Court upon the note. It was averred that Kopelove was taking an unfair advantage at law by making a Court of law an instrument of injustice and permitting Schear to obtain judgment contrary to equity, and that Sherman was entitled

to file his amended and supplemental bill and add as parties Ralph Schear and S. H. Robinson & Co., it appearing that S. H. Robinson & Co. was also a maker of said note with Max Robinson, it being averred that Sherman had a right to file this supplemental bill to enjoin further prosecution of the suit by Ralph Schear against the Robinsons in the Second Circuit Court of Knox County, Tennessee, to the end that all proceedings with reference to the note and the title thereto might be settled in one Court; that Ralph Schear was not the owner of the note, but it was the property of Kopelove. Process was asked for Ralph Schear, it being averred he had entered his appearance in the State of Tennessee, and also for S. H. Robinson & Company, requiring both to answer, S. H. Robinson & Co. along with Max Robinson, to answer what they were indebted to Ralph Kopelove; that an injunction be issued against Schear and be served upon his attorney in the Circuit Court suit and that Schear prosecute his suit in the Chancery Court to prevent a multiplicity of suits. There was a further prayer for the same relief sought by the fourth prayer of the original bill, and it was prayed that Robinson and his company be enjoined from paying to Kopelove or Schear moneys due on said note or notes, and that the Robinsons be required to pay said notes into the registry of the Court, pending final hearing (R. 10-16).

The Chancellor's fiat directed the issuance of writs of injunction and attachment as prayed in the amended and supplemental bill (R. 16); subpoena to answer issued March 1st for Ralph Schear and S. H. Robinson & Co., requiring them to appear the third Monday in March and it was served by the sheriff with a special return that search was made and the defendant Ralph Schear was not to be found in the Sheriff's County, was reported to be a resident of Ohio, and that "at the request of complainant's solicitor, I read the summons to Wilbur W. Piper

as attorney for Ralph Schear, said Piper objected to the attempt to serve Ralph Schear by reading the summons to him and I accordingly left a copy of the summons with said Wilbur W. Piper", service being had March 10, 1943. Injunction issued March 1st and was served March 10th, with the same return as the attempted service on Schear by reading the injunction to his attorney. Attachment issued March 1st, and there is no return showing its service by the sheriff, there being a recital "executed as commanded by serving garnishment on S. H. Robinson. This Mar. 1, 1943," with no signature of the officer following this recital (R. 20).

There was no order made directing publication of a non resident notice, and no publication of non resident notice made at all, none being found in the record.

On March 10, 1943, Max Robinson and S. H. Robinson & Co. filed answer and cross bill, it being stated therein that S. H. Robinson & Co., Inc., made a brokerage contract with Sherman and Kopelove as partners, to finance them as such, copy of such contract being filed; that about May 25, 1942, the partnership transferred to Max Robinson the contract of partnership with Lenoir Car Works, and defendants (Robinson and S. H. Robinson & Co.) agreed to pay the partnership $4500.00, and the partnership released its claim to the Lenoir Car Works contract, the final details being handled in Dayton, Ohio, between Max Robinson and Ralph Kopelove, in the presence of Ralph Schear and the attorney for Kopelove, when Max Robinson and S. H. Robinson & Co., Inc., executed the note for $4500.00, payable $500.00 each month commencing July 1st, 1942, *to the order of Ralph Kopelove*, which note represented the purchase price of the contract signed by the partnership to the Robinsons; that thereafter they paid $500.00 monthly on the note by checks payable to Kopelove Iron & Metal Co., until suit was brought in No-

vember, 1942, enjoining them from making further payments to Kopelove, because Sherman had not received his part of the purchase price. It was stated that no one had told them that anyone other than the payee was entitled to receive the payments; that about ten days after the suit was brought, Kopelove, Schear and his attorney came to defendant company and requested payment of the note to Kopelove, it being represented that, if they paid the note, Kopelove would satisfy Sherman; that Robinson advised that he had been enjoined; it was admitted that $2500.00 was due on the note and the Robinsons were ready and willing to pay the same to whomsoever the same was due.

The answer passed to a cross bill in the nature of an interpleader, it being stated that, immediately after the conference between the Robinsons and Kopelove and Schear on Nov. 20, 1942, Schear filed suit in the Court of Common Pleas of Montgomery County, Ohio, on the note and obtained judgment by confession against cross complainants for $2500.00, that they were not notified that Schear claimed to own the note, nor of said suit; that subsequently, on January 5, 1943, Ralph Schear, acting through his attorney, Wilbur W. Piper, a solicitor at this bar, sued them in Second Circuit Court of Knox County, setting up the Ohio judgment and in the second count sued upon the note, a certified copy of the proceeding in the Ohio Court being attached to the declaration; that to date there had been nothing done but filing of the declaration. They asked that the original note sued on in the Circuit Court be produced and exhibited. They averred no interest in the controversy between Kopelove, Sherman and Schear, and because they were enjoined in that suit and pursued in Second Circuit Court, that the situation entitled them to interplead, and pay the money into Court, so that the parties entitled thereto might receive the same, their interest being that, prior to the disbursement of the fund, their note,

properly cancelled and marked paid, be surrendered and the purported judgment in Ohio, and in the Circuit Court of Knox County, be satisfied.

The prayer asked that Ralph Schear be interpleaded by proper process served upon his attorney of record, Wilbur W. Piper, and likewise be enjoined from prosecuting the Second Circuit Court suit further than to judgment, and be required to come into this Court and cause and establish his claim and answer the cross bill. Process as to Sherman and Kopelove was not asked, but it was prayed that they be required to come into the Court and cause and make answer to the cross bill and that complainant and cross defendants be required to interplead to settle the rights to the funds paid into the Court, and the Robinsons be discharged of all liability and recover costs with a perpetual injunction (R. 20-26).

The Chancellor's fiat directed the issuance of the injunction as prayed for and also an injunction against the Clerk of the Circuit Court of Knox County, from issuing execution (R. 26).

Subpoena to answer issued March 10, 1943 and the return as to Ralph Schear is similar to that on the subpoena to answer to the amended and supplemental bill. Injunction issued March 19, with a similar return as to service on Ralph Schear, by reading the injunction to his attorney.

There was no process issued for Sherman or Kopelove, none appearing in the record.

The injunction included Jessie Marie Miller, Circuit Court Clerk, and enjoined her from issuing execution, and on April 6, 1943, the Clerk filed an answer and attached thereto certified copy of a final decree obtained in the suit of *Ralph Schear* v. *S. H. Robinson & Co.* and *Max Robinson*, Rule Docket 11136, entered March 8, 1943, this judgment being found in the record, pp. 35-36, and shows judgment for Ralph Schear against S. H. Robinson & Co. and Max

Robinson upon the Ohio judgment in the total sum of $2558.37. The answer contends that the proceedings in the suit showed no jurisdiction had been obtained of Kopelove and Schear, and that the suit for interpleader should not be entertained because the Court had no jurisdiction of either Schear or Kopelove (R. 31-34).

By order entered May 17, 1943, motion of the Robinsons to strike the Clerk's answer was sustained, because she was not a party defendant.

A second amended and supplemental bill was filed by Sherman April 8, 1943, reference being made therein to previous proceedings and the filing of cross bill by the Robinsons and payment of money into court, and it was stated that, the money being in Court, it was proper at this time for Sherman to come into Court, and pray that the money be held for further orders of the Court, and, if proper, that another attachment issue to be levied on the individual interests of the debtor in said fund, and that, because of the suit of Schear against the Robinsons, the claim of Schear and Kopelove should be inquired into, to the end that the interests of Kopelove and complainant in the note be ascertained and the money subjected to the payment of Sherman's demand; that, as a further ground of attachment, in favor of Sherman, that the subject matter of the suit, the money attached was impounded in Court and the necessity for formal attachment dispensed with; but to save the question, if the need arose, that an attachment be levied on the fund insofar as the defendant Ralph Schear was concerned, in order that his rights and liabilities as between himself and Kopelove be ascertained by the Court, it being averred that Schear's rights were subordinate to those of Sherman. The prayer asked permission to file a second amended and supplemental bill and the "defendants" and each of them be required to appear and answer; that the matters between Schear, Kope-

love and Sherman be settled and the interests of Kopelove in the note be ascertained and appropriated to the satisfaction of Sherman's debt; that the fund be held subject to the further orders of the Court and that, on the levy of attachment, further publication be made to notify Schear and Kopelove to appear and answer the bill. There was no prayer for judgment against Schear, but a prayer that his rights be adjudicated (R. 39-43).

The Chancellor's fiat directed the issuance of a writ of attachment as prayed for, and that the Clerk & Master hold the funds impounded in Court and attach the same in his hands and upon said attachment make publication as to the non resident defendants Schear and Kopelove, "as provided by law in attachment cases" (R. 43).

Non resident attachment notice was published, but there is no statement therein that any funds or assets of Schear and Kopelove were attached and that they were required to appear by reason of an attachment (R. 43-44).

Order pro confesso was entered June 14, 1943, on motion of Max Robinson and S. H. Robinson & Co., Inc., against Ralph Schear and Ralph Kopelove, because they were in Court by publication duly made (R. 48); order pro confesso entered June 19, 1943, on motion of Sherman against Kopelove and Schear because publication had been duly made for them on the original bill and the amended and supplemental bills (R. 49).

Final Decree was entered June 26, 1943, reciting the case was heard on the original bill, the amended and supplemental bills, answer and cross bill of the Robinsons, the answer of the Circuit Court Clerk, the answer of Joe Sherman to the cross bill, military affidavit filed by Sherman, pro confesso taken and depositions of witnesses and the entire record, from all of which the court found that Kopelove and Schear were duly in Court by publication heretofore made concerning the fund deposited in the

Registry of the court and that they had also been duly informed of the pendency of the action by service of process upon Wilbur W. Piper, solicitor of record for defendant Schear in the *Circuit Court* case. The Court found that the facts charged by Sherman in the original bill, as amended and supplemented, were sustained; that Kopelove was indebted to Sherman for $2650.00, because of their partnership affairs, Sherman being entitled to one-half of the $4500.00 note and $400.00 represented by salary; that $2500.00 was owing on the note; that the bill of interpleader was properly filed and sustained and the rights of the parties transferred to the fund and the Court further found that Kopelove and Schear entered into a conspiracy to defraud Sherman out of money due on the note; that Schear had no interest in the note and, if it was ever transferred to him, it was with full knowledge of the equities of Sherman and Schear was not an innocent holder for value. The Court thereupon found that the purported confessed judgment dated Nov. 20, 1942, at Dayton, Ohio, in favor of Ralph Schear against Max Robinson and S. H. Robinson & Co. was but part of the fraudulent scheme and conspiracy and that said judgment was fraudulent and void as to Max Robinson and S. H. Robinson & Co. The Court further found as to the Second Circuit Court suit, that Kopelove and Schear were attempting to obtain an unfair advantage at law against the Robinsons and it was therefore ordered and decreed that Schear be permanently enjoined from prosecuting the Second Circuit Court suit and Kopelove and Schear be perpetually enjoined from prosecuting any similar suit against the Robinsons in any court.

The Court found that, the fund being in Court *Morrow* vs. *Fossick,* 71 Tenn., 129, controlled and the attachment under the last amended bill was sustained. Judgment for Sherman against Kopelove for $2650.00 was entered, and the $2500.00 in Court was ordered subjected to the satisfac-

tion thereof, less the costs, less a fee allowed the Robinsons' solicitor, and the fund used to discharge the costs of this case and the Circuit Court suit, the solicitor of Robinson being awarded a $250.00 fee and the balance ordered paid to Sherman's solicitors.

Further prosecution of the Second Circuit Court suit having been permanently enjoined, the Circuit Court Clerk was directed to note upon the execution docket, opposite the entry of said judgment, that issuance of execution upon the judgment had been permanently enjoined in the Chancery Court. The liability of the Robinsons on the note was likewise fully and finally discharged (R. 69-73).

Later, on motion of Sherman, an order was entered July 27, 1943, directing the Clerk & Master to comply with the final decree, more than thirty days having elapsed, and to make disbursements as provided by the final decree (R. 73-74).

Neither Kopelove nor Sherman entered any appearance in the aforesaid cause and a certified copy of the record in the Chancery Court was filed in the Supreme Court of Tennessee at Knoxville September 10, 1943, for writ of error.

(*b*) *In the Supreme Court of Tennessee.*

The record having been filed for writ of error, separate assignments of error and brief in support thereof, were filed by petitioners on September 10, 1943 (R. 79, 99), reply briefs being filed by Max Robinson and S. H. Robinson & Co., Inc. (R. 106), reply brief filed by Joe Sherman October 16, 1943 (R. 115) combined rejoinder brief filed by Kopelove and Schear to the foregoing replies (R. 139).

Further proceedings were had as heretofore stated.

II.

Jurisdictional Statement.

1. The jurisdiction of this Court is based upon U. S. Code Title 28, Sec. 344(b) (Judicial Code Sec. 237 amended).

The decision of the Supreme Court of Tennessee becoming final by the opinion, denying petition to rehear, filed March 7, 1944, and by order entered March 4, 1944, this petition, with certified transcript of the record, is filed in this Court within three months after said decree became final.

2. The Supreme Court of Tennessee, by its opinion and affirmance of the proceedings of the Chancery Court of Knox County, Tennessee, deprived petitioners of their property without due process of law, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States, in that the Chancery Court had no jurisdiction of petitioners, because the procedure proscribed by the statutes of Tennessee regulating attachment by garnishment was not followed in any particular and petitioners were never brought before the Court by lawful service of process and never entered their appearance, and both petitioners, by their respective assignments of error, pointed out the many imperfections in the procedure in the various attempts by both Sherman and the Robinsons to obtain jurisdiction of petitioners.

Petitioner Schear, in addition to invoking the 14th amendment to the Constitution of the United States by proper assignments of error in the Supreme Court of Tennessee, likewise invoked Article 4, section 1 of the Constitution of the United States, that the Chancery Court failed to give full faith and credit to the judicial proceedings of the State of Ohio, granting him a judgment in the Court of Common Pleas of Montgomery County, Ohio,

against Max Robinson and S. H. Robinson & Co., in that the Chancery Court invalidated such judgment without having personal jurisdiction of petitioner Schear.

Petitioner Schear was likewise denied due process of law under the 14th amendment, in that the Chancery Court entered a decree *in personam* as to him, without having jurisdiction of him. The Supreme Court of Tennessee, by its failure to reverse the Chancery Court and dismiss the suit there and void its decree, denied petitioners' rights, privileges and immunities, claimed by them under the Constitution of the United States.

3. The question presented is substantial, because—

(a) The decree of the Chancery Court of Knox County, in the original attachment suit, was rendered without any compliance with the statutes regulating attachment by garnishment, and resulted in a judgment against petitioner Kopelove when no *res* belonging to him was impounded in the cause;

(b) In addition to rendering judgment against petitioner Kopelove in the Chancery decree, the Court acted *in personam* against petitioner Schear by invalidating the judgment rendered in his favor in the Court of Common Pleas of Montgomery County, Ohio against Max Robinson and S. H. Robinson & Co., invalidated a judgment obtained by petitioner Schear in the Second Circuit Court of Knox County, Tennessee, taken upon default against the Robinsons, in the enforcement of the judgment obtained in Ohio, and by a permanent injunction prevented the collection by petitioner Schear of his judgment in Second Circuit Court of Knox County, Tennessee, when neither respondent Sherman nor respondents Robinson obtained jurisdiction of such petitioner by service of process.

(c) The interpleader attempted by the Robinsons in their cross bill was sustained as to both petitioners, Kopelove and Schear, when neither were before the Court by proper service of process.

The opinion of the Supreme Court of Tennessee contradicts the holdings of this Court and the holdings of previous opinions of the Supreme Court of Tennessee, and if the published opinion of the Supreme Court of Tennessee is unchallenged and is followed hereafter by the Courts of Tennessee, litigants in future cases will be deprived of property without due process of law and full faith and credit in the judgments of courts of other states will be impaired.

III.

The Questions Presented.

1. Can Sherman recover a judgment against Kopelove by an attempted attachment by garnishment against the makers of a negotiable note executed in Ohio, without proper execution of attachment by service of writ of garnishment against the resident makers? And, failing to obtain service by such garnishment writ, and the garnishees not being before the Court, voluntarily interpleading by answer and depositing the amount of their indebtedness in the registry of the Court, thus constituting a *res* which could be reached by another attachment granted by fiat of the Court, and without proper publication of non resident notice?

2. Can the makers of a negotiable note, without being properly served with garnishment writ, in an attachment suit, voluntarily file answer, coupled with interpleader, and bring before the Court a non resident of Tennessee, without service of process on such non resident, when the interpleaders are not disinterested and do not bring before the Court all the parties making diverse claims against them?

IV.

Reasons Relied On for Allowance of Writ of Certiorari.

The Supreme Court of Tennessee has, by its opinion, overruled and by-passed decisions of this Court, beginning with—

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565;
Cooper v. *Reynolds*, 77 U. S. 308, 19 L. Ed. 931;
Chicago &c. v. *Sturm*, 174 U. S. 710, 43 L. Ed. 1144;
Baker v. *Baker*, 242 U. S. 394, 61 L. Ed. 386;
Harris v. *Balk*, 198 U. S. 215, 49 L. Ed. 1023;
Bank of Jasper v. *1st Nat'l Bank*, 258 U. S. 112, 66 L. Ed. 490;
McDonald v. *Mabee*, 243 U. S. 90, 61 L. Ed. 608;
Baldwin v. *Iowa State Traveling Men's Asso.*, 283 U. S. 522, 75 L. Ed. 1245;
New York Life Ins. Co. v. *Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140;
Sanders v. *Armour Fertilizer Works*, 292 U. S. 190, 78 L. Ed. 1206.

By approving *Morrow* v. *Fossick*, 71 Tenn. (3 Lea) 128, the Supreme Court of Tennessee overrules *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, 78 L. Ed. 1206, wherein this Court held that an insurance company sued as a garnishee in Illinois could not interplead the Illinois complainant into the District Court of Texas, so as to deprive the Illinois court of the right to proceed in an attachment first instituted there, and that the depositing of money with the interpleader in the U. S. District Court did not destroy the lien obtained under the attachment proceeding in Illinois and did not constitute a *res* giving the Texas court jurisdiction. Likewise the approval of *Morrow* v. *Fossick* overrules *New York Life Insurance Co.* v. *Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140.

Wherefore your petitioners pray that writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Tennessee, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Supreme Court of Tennessee, had in the cause numbered and entitled on its docket, *Joe Sherman* v. *Ralph Kopelove, et al.*, Chancery Cause No. 8, from Knox County, at the September Term, 1943, to the end that this cause may be reviewed and determined by this Court, as provided by the Statutes of the United States, and the judgment thereon of said Supreme Court of Tennessee be reversed by this Court, and for such further relief as to this Court may seem proper.

RALPH KOPELOVE,
RALPH SCHEAR,
By WILLIAM W. PIPER,
Attorney for Ralph Kopelove
and Ralph Schear.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 217

RALPH KOPELOVE AND RALPH SCHEAR,
Petitioners,

vs.

JOE SHERMAN, MAX ROBINSON AND S. H. ROBINSON & COMPANY, INC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

I.

Opinions of the Court Below.

The Opinion of the Supreme Court of Tennessee has been reported in the case styled *Joe Sherman* v. *Ralph Kopelove, et al.*, in 177 Southwestern (2) 19, Advance Sheets February, 1944, and will be reported in Vol. 180 of Tennessee Reports when published. The Opinion is in the record at page 155.

II.

Jurisdiction.

1. The jurisdiction of this Court is based upon U. S. C., Title 28, Section 344(b), Section 237 of the Judicial Code as amended.

2. The original date of the judgment of the Supreme Court to be reversed is January 8, 1944 (R. 155), petition for rehearing being filed January 18, 1944, within the time allowed therefor (R. 158), and petition for rehearing was denied March 4, 1944, and then became final (R. 178).

3. Petitioners jointly invoke Section 1 of the Fourteenth Amendment to the Constitution, that they were denied due process of law; and Petitioner Schear invokes Article 4, Section 1, of the Constitution of the United States, that the Chancery Court of Knox County and the Supreme Court of Tennessee denied full faith and credit to him under a judgment secured in the Court of Common Pleas of Montgomery County, Ohio, against Respondents Max Robinson and S. H. Robinson & Company, Inc.

III.

Statement of the Case.

The essential features of the case, with reference to procedure, are fully stated in accompanying petition for certiorari, which also contains a full statement of the questions presented, but some points will be elaborated upon herein.

IV.

Specification of Errors in Behalf of Ralph Kopelove.

The Supreme Court of Tennessee erred:

1. In affirming the Chancery Court of Knox County, Tennessee, and in not sustaining Assignment of Error Number 1 of Ralph Kopelove, to the effect that the Chancery Court of Knox County erred in rendering any judgment or decree against Respondent, under either the original bill, first and second amended bills, and the answer and cross-bill of Max Robinson and S. H. Robinson & Com-

pany, Inc., for the reason that no jurisdiction was obtained of Kopelove under either of them, by service of process, appearance by the defendant, or by publication of non-resident notices, for the following reasons appearing in the technical record, and as specified in the original Assignment of Errors:

(a) The making of Max Robinson a party defendant to the original bill by subpoena to answer and his subsequent appearance by answer and cross bill, did not give the Court jurisdiction of this defendant;

(b) The issuance and service of injunction under the original bill against Max Robinson and his appearance later by answer and cross bill, did not give the court jurisdiction of this defendant;

(c) The issuance of the attachment under the original bill and subsequent publication of non resident attachment notice for this defendant is void, because—

The attachment was not executed by the officer, the only return thereon, with the officer's signature, being "came to hand 7th day of Nov., 1942."

No attachment notice was ever served upon Max Robinson under the attachment issued.

The order for publication of non resident attachment notice on the Rule Docket was in error in reciting that an attachment was issued and levied on this defendant's property.

The non resident attachment notice as published does not say that there was an attachment issued and levied upon defendant's property, or the attachment executed by notice of garnishment upon anyone.

(d) All proceedings had under the first amended and supplemental bill are void, because—

No valid service of process was ever had as against defendant Ralph Schear, the attempt at service upon an attorney for him being unlawful and void.

Issuance and service of subpoena to answer upon S. H. Robinson & Co. did not result in the Court having jurisdiction of this defendant.

Issuance and service of injunction against Ralph Schear was void because not served upon him, service upon his so-called attorney being unlawful and void.

Issuance and service of the injunction against S. H. Robinson & Co. did not result in the Court obtaining jurisdiction of this defendant.

Service of injunction was never had against S. H. Robinson & Co., but only against S. H. Robinson, as shown by the Officer's return.

Issuance and service of attachment under the amended and supplemental bill did not result in the Court obtaining jurisdiction of this defendant, because such attachment was not properly served by service of garnishment notice upon S. H. Robinson, there being no service of garnishment notice on S. H. Robinson & Co.

No non resident publication was ever made in support of the attachment attempted to be served upon S. H. Robinson & Co.

(e) All proceedings had under the answer and cross bill and interpleader of Max Robinson and S. H. Robinson & Co. as to this defendant are void, because—

No subpoena to answer was ever lawfully served upon Ralph Schear, the attempted service thereof upon his attorney being void because he was a non resident of Tennessee.

No subpoena to answer was ever issued or served upon this defendant.

No non resident publication was ever attempted or had as to either Ralph Schear or this defendant.

The Court had no jurisdiction of the subject matter of the cross bill of interpleader, because there was no showing thereon that two or more persons were claiming adversely to each other the same debt or duty from Max Robinson and S. H. Robinson & Co., and the Robinsons were shown to have title, claim and interest to their own money and were in no danger of being held liable to both, Joe Sherman and Ralph Schear, and cross complainants showed a special liability to Ralph Schear and none to this defendant, and they were not indifferent as between the alleged claims.

By the answer and cross bill the Robinsons showed an indebtedness by negotiable note and their answer was conclusive and entitled them to a discharge in this cause.

(f) All proceedings had under the second amended and supplemental bill as to this defendant are void, because—

This defendant had not at that time been brought before the court under either the original bill, first amended and supplemental bill or the cross bill.

There was no fund impounded in the registry of the Court belonging to this defendant that could be attached by fiat of the Court or writ of attachment.

The jurisdiction of this defendant was not obtained because the fund in the registry of the Court was the property of Max Robinson and S. H. Robinson & Co., Inc.

No money recovery being sought against Ralph Schear, and the Court not having jurisdiction of him in any way, jurisdiction of this defendant could not be had by the attempted non resident publication.

The order for non resident publication was in error in reciting that an attachment had been issued and levied upon this defendant's property.

No attachment was ever issued or levied under the second amended and supplemental bill upon the property of this defendant.

The non resident attachment notice published thereunder does not say that any property of this defendant had been attached in any way.

2. In affirming the decree of the Chancery Court of Knox County, Tennessee, and in not sustaining assignment of error No. 3 which read:

> "The Court having no jurisdiction of the defendant, for the various reasons set forth in assignment of error number 1, the entry of a final decree and judgment against this defendant violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of his liberty and property without due process of law."

V.

Specification of Errors in Behalf of Ralph Schear.

The Supreme Court of Tennessee erred:

1. In affirming the Chancery Court of Knox County, Tennessee, and in not sustaining assignment of error No. 1 of Ralph Schear, to the effect that the Chancery Court of Knox County erred in rendering any judgment or decree against Respondent, under either the original bill, first and second amended bills, and the answer and cross-bill of Max Robinson and S. H. Robinson & Company, Inc., for the reason that no jurisdiction was obtained of Schear under either of them, by service of process, appearance by the defendant, or by publication of non-resident notices, for the following reasons appearing in the technical record, and as specified in the original Assignment of Errors:

(a) The making of Max Robinson a party defendant to the original bill by subpoena to answer and his subse-

quent appearance by answer and cross bill, did not give the Court jurisdiction of Ralph Kopelove;

(b) The issuance and service of injunction under the original bill against Max Robinson and his appearance later by answer and cross bill, did not give the Court jurisdiction of Ralph Kopelove;

(c) The issuance of the attachment under the original bill and subsequent publication of non resident attachment notice for Ralph Kopelove is void, because——

The attachment was not executed by the officer, the return thereon, with the officer's signature, being "Came to hand 7th day of Nov., 1942."

No attachment notice was ever served upon Max Robinson under the attachment issued.

The order for publication of non resident attachment notice on the Rule Docket was in error in reciting that an attachment was issued and levied on Ralph Kopelove's property.

The non resident attachment notice as published does not say that there was an attachment issued and levied upon Ralph Kopelove's property, or the attachment executed by notice of garnishment upon anyone.

(d) All proceedings had under the first amended and supplemental bill are void, because—

No valid service of process was ever had as against defendant Ralph Schear, the attempt at service upon an attorney for him being unlawful and void.

Issuance and service of subpoena to answer upon S. H. Robinson & Co. did not result in the Court obtaining jurisdiction of Ralph Kopelove or this defendant.

Issuance and service of injunction against Ralph Schear was void because not served upon him, service upon his so-called attorney being unlawful and void.

Issuance and service of the injunction against S. H. Robinson & Co. did not result in the Court obtaining jurisdiction of Ralph Kopelove or this defendant.

Service of injunction was never had against S. H. Robinson & Co., but only against S. H. Robinson, as shown by the officer's return.

Issuance and service of attachment under the amended and supplemental bill did not result in the Court obtaining jurisdiction of Ralph Kopelove or this defendant, because such attachment was not properly served by service of garnishment notice upon S. H. Robinson, there being no service of garnishment notice on S. H. Robinson & Co.

No non resident publication was ever made in support of the attachment attempted to be served upon S. H. Robinson & Co.

(e) All proceedings had under the answer and cross bill and interpleader of Max Robinson and S. H. Robinson & Co. as to Ralph Kopelove and this defendant are void, because—

No subpoena to answer was ever lawfully served upon Ralph Schear, the attempted service thereof upon his attorney being void because he was a non resident of Tennessee.

No subpoena to answer was ever issued or served upon Ralph Kopelove.

No non resident publication was ever attempted or had as to either Ralph Kopelove or this defendant.

The Court had no jurisdiction of the subject matter of the cross bill and the bill of interpleader, because there was no showing thereon that two or more persons were claiming adversely to each other the same debt or duty from Max Robinson and S. H. Robinson & Co., and the said Robinsons were shown to have title, claim and interest to their own money and were in no danger of being held liable to

both Joe Sherman and Ralph Schear, and cross complainant showed a special liability to Ralph Schear and none to Ralph Kopelove, and they were not indifferent as between the alleged claims.

By the answer and cross bill the Robinsons showed an indebtedness by negotiable note and their answer was conclusive and entitled them to a discharge in the cause.

(f) All proceedings had under the second amended and supplemental bill as to Ralph Kopelove and this defendant are void, because—

Ralph Kopelove had not at that time been brought before the Court under either the original bill, first amended and supplemental bill or the cross bill.

There was no fund impounded in the registry of the Court belonging to Ralph Kopelove or this defendant that could be attached by fiat of the Court or writ of attachment.

The jurisdiction of this defendant was not obtained because the fund in the registry of the Court was the property of Max Robinson and S. H. Robinson & Co.

No money recovery being sought against this defendant, and the Court not having jurisdiction in any way, jurisdiction of this defendant could not be had by the attempted non resident publication.

The order for non resident publication was in error in reciting that an attachment had been issued and levied upon this defendant's property.

No attachment was ever issued or levied under the second amended and supplemental bill upon the property of this defendant.

The non resident attachment notice published thereunder does not say that any property of this defendant had been attached in any way.

2. In affirming the decree of the Chancery Court of Knox County, Tennessee, and in not sustaining assignment of error No. 4, which reads as follows:

> "The Court having no jurisdiction of this defendant or Ralph Kopelove for the various reasons set forth in Assignments of Error I and II, entry of final decree and judgment against this defendant violated his rights under Section 1, of the 14th Amendment to the Constitution of the United States, in that it deprived this defendant of his liberty and property without due process of law."

3. In not sustaining respondent's assignment No. 5 in that Court as follows:

> "The Court erred in adjudicating adversely to this defendant in any respect and particularly under the answer and cross bill of Max Robinson and S. H. Robinson & Co., because the judgment obtained by this defendant in the Court of Common Pleas of Montgomery County, Ohio, against Max Robinson and S. H. Robinson & Co. was *res adjudicata* of this defendant's rights as against them and Joe Sherman; and in addition, the Second Circuit Court of Knox County, Tennessee, had rendered judgment upon the aforesaid Ohio judgment in favor of this defendant against Max Robinson and S. H. Robinson & Co. on March 8, 1943, in case No. 11,136, and before the answer and cross bill of the Robinsons was filed and entry of such judgment was *res adjudicata* as against the Robinsons, as well as Joe Sherman."

4. In not sustaining respondent's assignment of error No. 6, reading as follows:

> "This defendant having procured a valid judgment in the Court of Common Pleas of Montgomery County, Ohio, against Max Robinson and S. H. Robinson & Co., upon the note at issue, such judgment was absolutely binding upon Max Robinson and S. H. Robinson & Co. and it was the duty of the Chancery Court to give full

faith and credit to the judicial proceedings of the State of Ohio, granting such judgment, and failure to do so violated Article 4, Section 1, of the Constitution of the United States."

5. In not sustaining respondent's assignment of error No. 9 before it, reading as follows:

> "The Court erred in sustaining the answer and cross bill of the Robinsons as a bill of interpleader and in adjudicating in any respect adversely as to this defendant and in holding that this defendant was not the true and lawful owner and holder of the note in question; and should have held that said note had been executed in the State of Ohio and in conformity with the laws of Ohio regulating negotiable instruments, and this defendant became the owner thereof by lawful negotiation."

VI.

Argument.

A. In the first place, it is insisted that every step of the process seeking to make respondents parties defendant did not conform to the Statutes of Tennessee regulating attachment and garnishment, issuance and service of process, and non-resident publication under attachment, and as the result respondents were denied due process of law, both being residents of Ohio, and that the Supreme Court of Tennessee has ignored previous decisions of both itself and of this Court protecting the rights of non-residents in attachment suits.

The Sections of the Code of Tennessee regulating attachment by garnishment are as follows:

> "Sec. 9428.—Where property, choses in action, or effects of the debtor are in the hands of third persons, or third persons are indebted to such debtor, the attachment may be by garnishment.
>
> "Sec. 9430.—Attachment by garnishment is effected by informing the debtor of the defendant, or person

holding the property of the defendant, that the property in his hands is attached, and by leaving with him a written notice that he is required to appear at the return term of the attachment, or before a justice of the peace, at a time and place fixed, to answer such questions as may be asked him touching the property and effects of the defendant.

"Sec. 9431.—The notice should also require the defendant not to pay any debt due by him, or thereafter to become due, and to retain possession of all property of the defendant, then or thereafter in his custody or under his control, to answer the garnishment.

"Sec. 9432.—A copy of the notice served upon the garnishee should be returned by the officer, with the attachment and levy, duly executed.

"Sec. 9446.—The garnishee shall not be made liable upon a debt due by negotiable or assignable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon, after he may have satisfied the judgment or decree."

To authorize an attachment by garnishment the plaintiff must have a debt or demand due at the commencement of the action to entitle him to subject the property of the defendant by attachment, Section 9396 of the Code of Tennessee granting such right as against non-residents and reads as follows:

"Sec. 9396.—Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity, against the property of a debtor or defendant, in the following cases:

"(1) Where the debtor or defendant resides out of the state."

In *Railway Company* v. *Brooks*, 90 Tenn., 161, it was held that a verbal notice of garnishment under an execution is not sufficient, written notice being absolutely necessary.

In *Fire Insurance Company* v. *Ford & Cantrell, 164 Tenn., 107, 115*, it was held that a garnishment notice, served upon the Insurance Commissioner of Tennessee, was not good as against an Insurance Company, the Insurance Commissioner not being deemed the Insurance Company's Agent, and that voluntary appearance of the Insurance Company by answer could not operate to transfer the intangible rights of the defendants against the Insurance Company, garnishee, to the custody of the Chancery Court. There was no manucaption of the policy of fire insurance or the proceeds of the policy, hence neither passed from the principal defendant and the garnishee to the custody of the Court. Further, the voluntary appearance of the Insurance Company by answer could not operate to transfer the intangible right, alleged to exist in favor of Ford and Cantrell (the debtor defendants) against the Insurance Company to the custody of the Court, this being so in Tennessee because the Insurance Company did not in its answer admit liability.

When the answer of a garnishee denies liability no judgment can be rendered against the Insurance Company as a garnishee.

Ford & Cantrell, Supra; Groveland Bank Co. v. *Bank*, 144 Tenn., 542; *Sentinel Fire Ins. Co.* v. *Nall*, 166 Tenn., 647.

The garnishment of the maker of a negotiable or assignable paper is ineffective unless the paper is delivered or the garnishee completely exonerated and indemnified of all liability thereof.

Sentinel Fire Ins. Co. v. *Nall, Supra*, p. 650; *Matheny* v. *Hughes*, 57 Tenn., 401; *Kimbrough* v. *Hornsby*, 113 Tenn., 605.

Gibson's Suits in Chancery is the Bible of equity pleading and practice in Tennessee. Section 877 of this excellent work outlines the steps to be taken to bring a defendant into court under an attachment bill; that where no subpoena is served upon a defendant he must be brought before court by levy of attachment upon his property and publication duly made; and that as soon as writ of attachment is returned with levy indorsed thereon the Clerk will enter on the Rule Docket an order of publication, in accordance with the form given at page 712 of Gibson's Suits in Chancery, and in a note to this Section the Author says:

> "Great care should be taken to have the order of publication, and the publication itself, in strict conformance with the statute; for, if the publication omit any essential, the whole proceeding founded upon it is an utter nullity. Bains v. Perry, 1 Lea, 37. The essentials of the published notice are: 1. The names of the parties to the suit; 2. The style of the Court to which the attachment is made returnable; 3. The Cause alleged for suing out the attachment; 4. The fact that the attachment has been levied on the defendant's property; 5. The time and place at which the defendant is required to appear, and defend the suit; and 6. The name of the Clerk & Master of the Court testing the notice. Code section 9473; Riley v. Nichols, 1 Heisk. 19; Bains v. Perry, 1 Lea 37. The order for publication need not be as precise as the published notice. Allen v. Gilliland, 6 Lea 531."

Sections 9469-9475 of the Code of Tennessee regulate procedure in attachment cases and Section 9473 provides, as to what the notice of levy to be published shall contain:

> "This memorandum or notice shall contain the names of the parties, the style of the court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which defendant is required to appear and defend the *attachment suit.*"

It has been held by the Supreme Court of Tennessee that a publication notice is undoubtedly defective where it fails to show that an attachment has been issued or that it had been levied, or the cause for which it had been issued.

Riley v. *Nichols,* 1 Heisk. (48 Tenn.) 16;
Bains v. *Perry,* 1 Lea (69 Tenn.) 37;
Howard v. *Jenkins,* 5 Lea (73 Tenn.) 176;
Holland v. *Railroad Co.,* 16 Lea (84 Tenn.) 414.

Without both levy and publication in due form, a judicial attachment will not support a judgment, unless the defendant appear.

Ingle v. *McCurry,* 48 Tenn., 26.

A decree rendered without these prerequisites is void.
Bain v. *Perry,* 1 Lea, 38-39;
Walker v. *Cottrell,* 65 Tenn., 256-273.

The record at pages 8-9 shows that there was no service of the original attachment under the original bill. Likewise, the non-resident attachment notice at page 9 does not state the cause alleged for suing out the attachment, and the fact that the attachment had been levied upon the defendant's property.

After the filing of the first amended and supplemental bill, the record shows that the attachment was not executed upon S. H. Robinson & Company, Inc., nor upon anyone, as the officer did not sign the return. There is a line stating that the attachment was executed as commanded by serving garnishment upon S. H. Robinson. However, there is no writ of garnishment attached to and made a part of the attachment or the return thereon (R. 19-20).

Under the answer and cross-bill and interpleader of the Robinsons, process was not issued for Ralph Kopelove and the only attempt to serve process was upon the attorney for Ralph Schear, there being no order of Court directing

that this be done (R. 29). This is, likewise, true of the injunction served upon Schear's attorney (R. 30-31). There was no process issued, let alone served, upon Ralph Kopelove or Joe Sherman upon the interpleader.

Following the filing of the second amended and supplemental bill the non-resident attachment notice does not show that it was executed upon any property of either Ralph Schear or Ralph Kopelove (R. 43-44). No process was issued under this proceeding.

It is submitted, therefore, that there was never any service of garnishment writ upon the Robinsons and that none of the publication notices stated that property of Ralph Schear or Ralph Kopelove was impounded under any alleged attachment.

B. The Supreme Court of Tennessee erred in holding that the attempted service of process under the second amended bill, with injunction, and under the interpleader, was effective as to either respondent. The Opinion of the Court in the last paragraph says that both the defendants employed an attorney in Tennessee, whereas the attorney of record in the Circuit Court case for Ralph Schear was not then the attorney of Ralph Kopelove and was never served with such process as the attorney of Kopelove. No process was ever issued for Kopelove and served upon his attorney. Such substituted service of process has been heretofore condemned by the Supreme Court of Tennessee and in *Thach* v. *Continental Travelers' Mutual Accident Association,* 114 Tenn. 271, an attorney for an Insurance Company was held not to be an agent upon whom service of process in a suit against the Company could be made and the Court did not acquire jurisdiction by such service.

The Supreme Court of Tennessee has approved a method of service upon a non-resident, through his resident attorney, where a resident defendant is sued by a non-resident

and the resident defendant files a cross-bill against a non-resident. In *Essenkay* v. *Essenkay Sales Company,* 132 Tenn. 287, a suit in Chancery Court, the complainants were non-residents, and the defendant asked the Court that service of process under the cross-bill be made upon the solicitor of record for the complainants. The Chancellor refused to make the order and the Supreme Court held the Court was in error. There must be an application specifically served upon the attorney for the non-resident complainant. The rule approved in the above Essenkay case, in commenting upon an English case, is as follows:

> "It is further stated in the text, however, that substituted service of a copy of the cross-bill upon the solicitor who filed the original bill will not be ordered, but that the court will in such a case stay the proceedings in the original cause until the defendants have entered an appearance. But in a note it is shown that the American rule is different, that substituted service is permitted in the United States courts in *cross-causes,* and *injunction bills to stay proceedings at law* in the *same court*—citing *Hitner* v. *Suckley,* 2 Wash. C. C. 465, Fed. Cas. No. 6543; *Ward* v. *Seabring,* 4 Wash. C. C. 472, Fed. Cas. No. 17160; *Dunn* v. *Clarke,* 8 Pet. 1, 8 L. Ed. 845; *Schenck* v. *Peay,* 1 Woolworth 175, Fed. Cas. No. 12450."

The Court held further that an order of court must be made allowing the substituted service as a preliminary thereto, and said order or copy thereof must be served with the process and copy of the bill and it must be stated in the order that it is to be so served.

There was no order in the cause below that service of process under the first amended bill and the interpleader should be made upon the attorney for Ralph Schear. Before the service was made, as shown by the return, and which service was made at the request of the complainant's solicitor, Petitioner Schear had already secured a

final judgment in the Circuit Court against the Robinsons, such judgment being entered March 8, 1944. (See Certified copy of Judgment, R. 35-36.)

C. Service of injunction under the amended bill and interpleader, on the attorney for Schear, was void and ineffective.

In *Hutsell* v. *Harrington,* 157 Tenn. 553, 557, the Supreme Court of Tennessee held that to be bound by an injunction it must be served upon a party or he must have actual knowledge thereof.

Gibson's Suits in Chancery, Section 825, considering cases *not* proper for injunctive relief, says: "The Chancery Court would not grant an injunction against a non-resident upon whom personal process has not been served," citing *1 High on Injunctions, Section 33.*

See *32 Corpus Juris, "Injunctions," Section 69, page 83,* where the text writer points out that an injunction operates *in personam* and would not issue against one not within the jurisdiction of the court.

See *Howell* v. *Thompson,* 130 Tenn. 310, 323-324, where the Supreme Court of Tennessee said:

> "If the court is without jurisdiction of the subject matter of the case in which it is attempted to proceed, its orders are void. An injunction made in respect to a subject matter beyond the jurisdiction of the court is a mere nullity and binding on no one. It may be disregarded. *State* v. *Ragghianti,* 129 Tenn. 560, 167 S. W. 689."

Supporting the foregoing points in part are the following Tennessee cases:

Edwards v. *New York Life Ins. Co.,* 173 Tenn. 102;
Purnell v. *Morton Live Stock Co.,* 156 Tenn. 383;
Commerce Union Bank v. *Scharber,* 20 Tenn. App. 451.

See *Kerr* v. *White*, 66 Tenn. 394, where it was held that a restraining order, to be effective against a party, that party must be subject to the Court's jurisdiction, and a party to the cause.

D. By Section 8962 of the Code of Tennessee the answer of a garnishee is not conclusive, where the sum in controversy is less than $1000.00. It has been held that where the amount is over $1000.00, the garnishee could have made conclusive answer and have been discharged.

See *Mahan Motor Company* v. *Lyle*, 167 Tenn. 193, where it was held, to warrant a judgment against a garnishee, the liability must clearly appear and the doubt must be resolved in favor of the garnishee. In addition to *Fire Insurance Company* v. *Ford and Cantrell* and *Insurance Company v. Nall, supra,* in support of the principle that the maker of a note cannot be held, unless the note is surrendered, see *Pickler* v. *Rainey*, 44 Tenn. 335; *Hughes* v. *Powers*, 99 Tenn. 480. Likewise, see *Groveland National Bank* v. *City National Bank*, 144 Tenn. 520, where Knoxville creditors of a non-resident sued him by attachment in Chancery, and attempted to attach a carload of beans. There being complications about the attachment of the beans in possession of a railroad, an amended and supplemental bill was filed making the City National Bank a party defendant to reach the proceeds of a draft, to which a bill of lading for the carload of beans was attached, as the property of the non-resident defendant. The Bank answered, admitting that the draft had been drawn and came through it and expressing its readiness to pay the money to the parties and obey the orders of the Court; the Court ordered the money paid to a receiver and later pro confesso was taken and final decree entered and the funds disbursed. The Groveland National Bank later sued the City National Bank for the proceeds of the draft, claim-

ing it was not a party to the suit and was the owner of the draft and the Bank defended with the theory that the Banking company had actual notice of the suit and did not intervene. The Supreme Court of Tennessee, however, gave judgment against the City National Bank and stated in part at page 542:

> "The argument in support of the defendant's contention is that an innocent garnishee may be wrongfully compelled to account for property in his hands twice. This contention overlooks the fact that the garnishee is in a perfect situation to protect himself. If he conceives himself to be in a situation of that sort, he can easily protect himself by having brought into court all persons interested in the fund. He can usually protect himself by his answer. To authorize a judgment against the garnishee, his indebtedness must clearly appear in so many words or from admitted facts which show his liability as a legal consequence. If the answer does not contain admissions sufficient to charge him, the garnishee must be discharged. For instance, if the garnishee answer that he does not know whether he is indebted or not, or if his answer is not sufficiently specific he must be discharged. See authorities cited in note 3, section 4831, Shannon's Code.
>
> "In this case if the defendant had answered setting up the facts which were within its knowledge, no judgment could have been rendered against it; that is to say, if the bank had shown in its answer to the court that this draft was made payable to the Groveland Banking Company, from whom defendant received it and to whom it was to account, and that it did not know whether the banking company was the owner of the draft or whether it belonged to the drawers thereof, no judgment could have been pronounced on such an answer or, *if such judgment should by error be pronounced,* the Groveland Banking Company could have been brought into court and required to set up its rights, if any it had, and in this way the defendant bank could

have been afforded ample protection against the payment of the money twice."

Likewise, to the same effect is *Hurst-Boillin Company* v. *Kelly,* 146 Tenn. 251. In that case the non-resident defendant filed a plea in abatement, denying that the draft in the bank belonged to him, and the Court held that the proceeds of a draft passing through a resident bank from a non-resident did not subject the non-resident owner of the draft to garnishment in an action in Tennessee against the depositor of the draft in a Kentucky Bank. The Court not only found that the draft was a negotiable instrument but the proceeds belonged to the Bank of Lexington, Kentucky; and that, under the plea of Kelly to the jurisdiction of the court, "if the fund did not belong to Kelly, then the Court had no jurisdiction, and jurisdiction can always be raised by plea in abatement."

The Supreme Court of Tennessee, has heretofore held in *Carroll* v. *Parkes,* 60 Tenn. 269, that a garnishee has a clear remedy at law to protect himself against an erroneous judgment in favor of the garnishor, or an action at law by a third party to recover the same fund. In that case the garnishee was sued in two justice of the peace suits, and judgment went down; and when he was sued again as garnishee he attempted to interplead the garnishor in Chancery and the Supreme Court held he could have successfully defended the judgment against him and he had no right to have the matter determined under interpleader in Chancery Court.

To the same effect is *Henegar v. Brannon,* 137 Southwestern (2d) 889, where the right to interplead was denied, even though money was paid into court.

See also *Bank of Whitehouse* v. *Baldridge,* 134 Tennessee 7, where the Bank of Whitehouse was denied the right to interplead because three classes of creditors were

making claim against the Bank, their claims not being against the same thing and the Bank could not force different types of creditors to interplead.

Joe Sherman was proceeding against the Robinsons as garnishor, and the Robinsons could have answered as garnishees and have been discharged. Sherman was not making the same claim against the Robinsons as Schear was making against the Robinsons. Sherman proceeded against them as garnishees, Kopelove being the principal defendant. Interpleader, therefore, did not lie because the same claim was not being made by Sherman, Kopelove and Schear.

See also *Newsom* v. *Interstate Rd. Company,* 153 Tenn. 202.

E. The judgment of Schear against the Robinsons in Ohio was *res adjudicata* as to them, being upon a negotiable note, with a provision for a confessed judgment. The transcript of the judgment from Ohio was sued upon in Circuit Court of Knox County, Tennessee, and judgment was obtained before the interpleader was filed. The Negotiable Instrument Act is a part of the law of Ohio (General Code of Ohio, Section 8110, et seq.) Section 8110 defines a negotiable instrument and permits a provision for a confession of judgment, if the instrument be not paid at maturity. Cognovit notes are valid in Ohio and have been approved for one hundred years.

Osborne v. *Rawley,* 190 Ohio 130;

McClure v. *Bowles,* 5 Ohio Nisi Prius, 327; 5 Ohio D. 288;

Sloo v. *Lea,* 18 Ohio, 279;

Swisher v. *Orrison Cigar Co.,* 122 Ohio State 195, 171 N. E. 92.

The General Code of Ohio expressly recognizes the power of courts to render judgment of confession upon warrants of attorney. (See Ohio Jurisprudence, Vol. 29, page 890).

F. The last amended bill did not seek a recovery against Schear, but prayed that he be made a party defendant by non-resident publication. The publication made was based upon a judicial attachment directed by the Court to be made. (See Fiat, R. 43). No attachment was ever issued as result of this fiat, and the non-resident publication notice wholly failed to say that an attachment had been ordered or made, or executed, the publication notice being wholly silent as to why it was being made and failing to say that any *res* of the defendants had been attached. (See Publication, R. 43-44).

The fund in court was not the property of either Kopelove or Shear but was the property of the Robinsons, improperly deposited in court when they were not made garnishee defendants, and under their abortive answer and interpleader. As pointed out heretofore, no process was ever served under this interpleader except that attempted to be made upon Schear. Kopelove was never before the court up to the time the last amended bill was filed. For the Court to have jurisdiction of him under this last amended bill, there must have been an attachment of *his* property, with proper non-resident publication advising him that his property was attached.

G. Former Opinions of the Supreme Court of Tennessee following *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565:

The Supreme Court of Tennessee has heretofore consistently followed this Court that jurisdiction of a non-resident cannot be obtained except by due process and that such due process requires a tracking of the Statutes of the State regulating attachment by garnishment:

Rose v. *Rose*, 176 Tenn. 680;
Edwards v. *N. Y. Life Ins. Co.*, 173 Tenn. 103, 107;
Dickson v. *Simpson*, 172 Tenn. 680, 687;
Knox Bros. v. *Wagner*, 141 Tenn. 354;

Southern Ry. Co. v. *Williams,* 141 Tenn. 46, 51;
Perry v. *Young,* 133 Tenn. 522, 536, 546;
Anderson-Tally Co. v. *Thompson,* 132 Tenn. 80, 87;
Knaffl v. *Golden Cross,* 121 Tenn. 212, 226;
Paper Co. v. *Shyer,* 108 Tenn. 444, 450;
Fitzsimmons v. *Johnson,* 90 Tenn. 416, 424;
Taylor, et ux. v. *Rountree,* 83 Tenn. 725, 727;
Lawson v. *Laundry Machinery Co.,* 165 Tenn. 180.

In the last case the Supreme Court of Tennessee said in part:

> "It is, however, recognized by all courts that a personal judgment may not be rendered against a non-resident defendant, of whom jurisdiction is acquired only by notice by publication. Perry v. Young, 133 Tenn. 522, 182 S. W. 577; Paper Company v. Shyer, 108 Tenn. 444, 67 S. W. 856, 58 L. R. A. 173; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100.
>
> * * * * * * *
>
> A cross-bill is an auxiliary suit, a dependency of the original litigation, and the dismissal of the original bill by the complainant may carry with it the cross-bill, or an answer filed as a cross-bill. Gibson's Suits in Chancery (Chambliss edition), section 726. In Moore v. Tillman, 106 Tenn. 361, 365, it was held that an answer filed as a cross-bill, upon which no cost bond was made nor process served, and which had not been replied to, went out of court with the complainant's voluntary dismissal of the original bill. But it has been ruled that a cross-bill, or an answer filed as a cross-bill, which has been replied to and on which proof has been taken, will not fall with the dismissal of the original bill, and may be prosecuted to judgment. Nichol v. Nichol, 63 Tenn. (4 Baxter) 145, 158; Partee v. Goldberg, 101 Tenn. 664; McDowell v. Hunt Contracting Co., 133 Tenn. 437."

II. The Opinions of this Court as to due process of law:

Pennoyer v. *Neff*, *Supra*, has long guided this Court in regulating jurisdiction of courts over non-residents. The principle is further illustrated in numerous other cases.

See *Cooper* v. *Reynolds*, 77 U. S. 308, 19 L. Ed. 931, where it was held that to obtain jurisdiction of a non-resident there must be service of process upon him, or his voluntary appearance, or seizure of the *res* belonging to him, under process of court.

In *Chicago, &c., Company* v. *Sturm*, 174 U. S. 710, 43 L. Ed. 1144, this principle was developed further, one feature being that where there is an attachment by garnishment due process requires that the laws be ample and be followed in bringing the garnishee before the Court.

In *Harris* v. *Balk*, 198 U. S. 215, 49 L. Ed. 1023, due process by attachment and garnishment was prescribed by the laws of Maryland and this Court held that the procedure was followed in a garnishment of a non-resident creditor within the State and jurisdiction, therefore, obtained of him.

See *Baker* v. *Baker*, 242 U. S. 394, 61 L. Ed. 386, where there was administration of the estate of Baker in Tennessee by his widow and the widow thereafter filed suit in Chancery Court of Hardin County, Tennessee, against the mother of the deceased, a resident of Kentucky, in which the Court adjudicated that the widow was the owner of the shares of stock in a Kentucky corporation, although the shares of stock were not seized. The widow sued upon this final decree in Kentucky, and this Court, when the case reached it, held that jurisdiction of the Kentucky mother was not obtained in the Tennessee proceeding, and that the facts surrounding jurisdiction could be inquired into when the suit was brought in Kentucky; and as a result of the failure of the Chancery Court of Hardin County, Tennessee, to acquire jurisdiction of the mother or the corporation issu-

ing the shares of stock, the Tennessee decree was not entitled to full faith and credit under Article 4, Section 1 of the Constitution of the United States. Featuring that case was the failure to seize the shares of stock. Also, mere knowledge on the part of the non-resident of the pendency of the suit in Tennessee did not estop the defendant to contest the result there, if he did not choose to submit himself to jurisdiction of the court in Tennessee.

To the same effect as to knowledge on the part of the non-resident of suit pending in another State see *Harris* v. *Balk, Supra; Bank of Jasper* v. *First National Bank,* 258 U. S. 112, 66 L. Ed. 490.

The *Bank of Jasper* case is practically identical with petitioners' theory that the Chancery Court of Knox County did not acquire jurisdiction of a *res.* The First National Bank of Rome, Georgia, an indorsee of five certificates of deposit given by the Bank of Jasper, Florida, brought suit in the District Court of the Southern District of Florida on such certificates and the Bank plead in bar seven decrees in suits brought in Florida against the defendant by various persons claiming to have been defrauded in a stock transaction. Florida residents purchased stock in a Georgia insurance company, gave notes therefor, and the notes were discounted by the Bank of Jasper, which issued certificates of deposit in lieu thereof, the certificates becoming the property of the First National Bank of Rome. The Rome bank had actually made a special appearance in the State Courts to quash summons issued against it and it was held by this court that it was a special appearance and in Florida such special appearance did not give the State Court jurisdiction.

This Court then held that the certificates of deposit of the Bank of Jasper were equivalent to promissory notes and did not constitute a *res* within the State of Florida, so as to give the State Courts jurisdiction to determine the liability

of the maker of the certificate of deposits to the holder where neither such certificates nor the holder thereof were within the State.

It is submitted that the holding of the Court in the above case entitles the Petitioners to have their rights determined by this Court, the Opinion of the Supreme Court of Tennessee being flatly contradictory of the *Bank of Jasper* case.

See *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517, where this Court held that there must be actual service within the State of notice upon a non-resident defendant or upon someone authorized to accept service for him; and *McDonald* v. *Mabee*, 243 U. S. 90, 61 L. Ed. 608, where it was held that a personal judgment entered against a non-resident, who had neither been served with process nor appeared in suit was void. Knowledge of a non-resident of a suit brought against him in another State permits him to ignore suit and defend its validity when sued in his own State.

> See *Baldwin* v. *Iowa State, &c. Assoc.*, 383 U. S. 522, 75 L. Ed. 1245, 1246.

This Court in *New York Life Insurance Company* v. *Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140, held that the Insurance Company, although properly served by writ of garnishment under execution, to answer what it owed a resident of California claiming rights under an insurance policy, had no right to file an interpleader for the purpose of bringing about a final and conclusive adjudication of the rights of the non-resident under the policy, and personal service of process could not be had on her. In other words, the Insurance Company could not interplead and deposit the moneys it owed to the non-resident or another, a resident of Pennsylvania, and by such practice force the non-resident to litigate her rights under the policy with the Pennsylvania

claimant; and any orders and judgments entered in the Pennsylvania suit were not binding upon the non-resident.

Applying this case to the instant suit, the Robinsons, not being served with writ of garnishment, could not voluntarily come into court, and, by interpleader, force Petitioners to appear and litigate with Joe Sherman over the money deposited by the Robinsons with their interpleader. Furthermore, the Robinsons, by simple answer, could have shown that they had executed a negotiable note in Ohio, and that this fact entitled them to a discharge under their answer, their answer being conclusive as to any sum over $1000.00.

See *Finch* v. *Great American Insurance Company,* 38 L. R. A. 1068;
Vertrees v. *Hicks,* 63 Tenn. (4 Baxter) 380;
Groveland Banking Company v. *Bank,* 144 Tenn. 542;
Mayor, &c., v. *Potomac Insurance Co.,* 61 Tenn. (2 Baxter) 303;
Sentinel Fire Ins. Co., v. *Nall,* 166 Tenn. 647.

In the *Dunlevy* case the last paragraph says:

> "The established general rule is that any personal judgment which a State court has rendered against one who did not voluntarily submit to its jurisdiction and who is not a citizen of the State or served with process within its borders, no matter what the mode of service, is void because the court had no jurisdiction over his person. Pennoyer v. Neff, supra; Freeman on Judgments, (2d Ed.) Sec. 120(a); Black on Judgments (2d Ed.) Sections 904, 905."

Tennessee cases holding that our Courts have no jurisdiction over a non-resident by publication, when attempting to act *in personam* are:

Edwards v. *N. Y. Life Ins. Co.,* 173 Tenn., 102;
Purnell v. *Morton Livestock Co.,* 156 Tenn., 383;
Commerce Union Bank v. *Sharber,* 20 Tenn. App. 451.

See *Thompson* v. *Tanner*, 87 Fed. 980, that, to acquire isdiction of a non-resident, there must be seizure of operty within the immediate jurisdiction of the Court. See *Seligman* v. *Mills*, 25 Fed. (2) 807, where it was held at the mere presence of notes in New York, sent there collection, did not authorize the New York court to ze the same and thus obtain jurisdiction of the non-resi- nt owner.

Sanders v. *Armour Fertilizer Works*, 292 U. S. 190, 78 Ed. 1206, is a case arising under the Act of Congress rmitting an Insurance Company to file an interpleader ere two are claiming the proceeds of a policy of insur- ce. Before filing this interpleader, the Armour Ferti- er Works had sued Sanders, in Illinois, making the In- rance Company, a defendant by garnishment, and this urt held that the Illinois suit gave Armour a lien; and t the filing of the interpleader in the District Court in xas did not deprive Armour of rights secured by its achment suit, in which publication of the Texas resident l been made. The vital point in this case, so far as Peti- ners are concerned, is that the depositing of the money h the interpleader did not destroy the lien obtained der the attachment suit in Illinois. Further, the opinion nted out that an interpleader must be entirely disinter- ed, must aver that he has no interest in the subject mat- of the suit, must admit title in the claimants and that is indifferent between them, "and he cannot seek relief the premises against either of them," citing *Killian* v. *Ebinghaus*, 110 U. S. 568, 571, 28 L. Ed. 246, 247.

The Robinsons did not show indifference between the imants, and actually sought a cancellation of the Ohio gment, and satisfaction of the Tennessee judgment, plus render of their note.

See *Pulitzer Publishing Co.* v. *Current News,* 94 Fed. (2) 682, where a Missouri resident sued a non-resident of Missouri in a State Court, making the Publishing Company a party by garnishment. The Publishing Company answered as such and admitted it owed the non-resident, Current News, and deposited $3750.00 in court. This suit was removed to the United States District Court by the non-resident, and the District Court later quashed the suit because of lack of jurisdiction of the non-resident but failed to direct the State Court to return the fund to the garnishee. The next day a new suit was begun in the State Court and writ of attachment was served upon the Clerk as garnishee; the Clerk answered that he had $3750.00 deposited with him as Clerk. This suit went to judgment without the non-resident appearing, and the money was disbursed. Current News, the non-resident, sued in the United States District Court in Missouri, to recover of the Publishing Company $4000.00 due it. The Court of Appeals for the 8th Circuit held that the money, although in the hands of the Clerk, was still the property of the garnishee, and not of the non-resident, and, therefore, there was no *res* belonging to the non-resident that would validate a garnishment proceeding against the Clerk. As result, Current News recovered from the Publishing Company.

This case is almost a parallel to the instant suit, except that there was never writ of garnishment served upon the Robinsons in the instant suit. The Supreme Court of Tennessee principally upheld the judgment in the Chancery Court, upon the theory that the judicial attachment under the second amended bill brought Petitioners before the Court. In this respect, the Supreme Court of Tennessee relies upon *Morrow* v. *Fossick* and repudiates Opinions of this Court.

For able discussions of conflict of laws in garnishment proceedings see *4 University of Chicago Law Review, p. 403* and *48 Yale Law Journal, page 690.*

Equitable jurisdiction by constructive service on a non-resident has been consistently denied in interpleader cases, where the *res* involved was a *chose in action.*

Gary v. *Northwestern Masonic Aid Assn.* 50 N. W. 27 (Ia.) 1691;
Rosenthal v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. Supp. 154 (1921);
Bullowa v. *Provident Life and Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1059 (1908);
Coe v. *Garvey*, 130 Ill., App. 221 (1913);
Harris v. *Bank of British North America*, 19 Ont. Pr. 51, (1900);
Washington Life Ins. Co. v. *Gooding*, 19 Tex. Civ. App., 490, 49 S. W., 123.

Payment of money into court does not confer jurisdiction over a non-resident in the exercise of *in rem* powers.

Re: *Benfield and Stevens*, 17 Ont. Pr. 339 (1897); *Cross* v. *Armstrong*, 44 Ohio State 613, 10 N. E. 160.

I. The jurisdiction of the Supreme Court of Tennessee to hear this case under a writ of error is approved in *Blanton* v. *Hall*, 49 Tenn., 423. There a defendant, never served with subpoena and who never appeared, after final decree went down, filed the record in the Supreme Court for writ of error, the writ was granted, and the judgment voided.

Gibson's Suits in Chancery, Section 1270-71, likewise, approved this procedure.

See also *Code of Tennessee, Section 9063*, et seq.

Petitioners never appearing in Chancery Court, what remedies did they have? In *Taylor* v. *Sledge*, 110 Tenn., 263, is found an answer. The defendants in that case had

sued the complainant for damages in the Circuit Court of Shelby County, Tennessee, and recovered a default judgment and later the complainant took the case to the Supreme Court by writs of error and supersedeas, claiming the writ of inquiry for damages should have gone to the jury and not executed by the Court. The Supreme Court affirmed the judgment, in *108 Tenn., 719.* Thereupon, the complainant (defendant in the damage suit) sued in the Chancery Court of Shelby County charging that the summons in the former suit was not served upon the complainant, Taylor, and thus the Circuit Court did not have jurisdiction of his person, and the judgment was absolutely void. The defendants contended that complainant was precluded to raise the point, by having filed the record for writ of error in the Supreme Court. This contention was upheld, and the Court, in considering the remedies Taylor might have had to support his contention that he was not served with process said:

> "Did the complainant, by suing out the writs of error and supersedeas in the case of Sledge, Wells & Co. against Taylor, enter his appearance in that case, and submit to the jurisdiction of the court? We hold that he did. He had the election of two remedies to correct any error committed against him. If there was error in the face of the record, he could have the judgment reversed upon writ of error from this court. If there was no jurisdiction of his person, the judgment was absolutely void, and he could have had it so decreed, and its collection enjoined, by proper proceedings in the chancery court. It was his right and his duty to choose between these two remedies. He could not have both, because a party is entitled to only one trial in court; the policy of the law being to prevent multiplicity of suits and to put an end to litigation. It is immaterial that the two remedies are not equally broad, as the defendant is not bound to adopt the one that is less effectual. A writ of error will not reach

all errors that may be committed against a defendant in such cases, because, in the absence of a bill of exceptions, they may not appear in the record. Yet he must, when he elects to pursue this remedy, take the chances of the soundness of his judgment, and abide the consequences."

Petitioners use of the writ of error in the Supreme Court of Tennessee, therefore, gave them a right to have the decree of the Chancery Court voided, and the constitutional questions required that they file the record for writ of error in the Supreme Court, which court has exclusive jurisdiction to consider constitutional questions.

It is earnestly insisted that the petition for certiorari should be granted and the two-pronged decree of the Chancery Court, giving a money judgment against Kopelove, and acting *in personam* against Schear, be voided, the Opinion of the Supreme Court of Tennessee reversed, and the cause remanded to that court for further proceedings.

Respectfully submitted,

WILBUR W. PIPER,
Attorney and Solicitor for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 217

RALPH KOPELOVE AND RALPH SCHEAR,
Petitioners,

vs.

JOE SHERMAN, MAX ROBINSON AND S. H. ROBINSON & COMPANY.

BRIEF OF RESPONDENTS IN OBJECTION TO PETITION FOR WRIT OF CERTIORARI.

JOHN JENNINGS, JR.,
Counsel for Respondents.

W. L. AMBROSE, JR.,
JENNINGS, O'NEIL & JARVIS,
Of Counsel.

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I.

Objections of Respondents to Grounds on Which the Jurisdiction of the Supreme Court of the United States Is Invoked.

The Supreme Court of Tennessee in its written opinion, which appears for publication in 177 S. W. (2d) at page 19 and will be reported in Vol. 180 of the Tennessee State Reports when published, after stating the facts of the case had this to say:

> "The record discloses that defendants came into this juris (fol. 229) diction (Tennessee) to enforce collection on the note or the foreign judgment; that they

employed an attorney to reduce the note to judgment here or to enforce the foreign judgment; and that in addition to making publication for these two defendants, the attorney of record in the circuit court for these same two defendants was served with written notice of the present cause. The defendants cannot now be heard to say that their constitutional rights, or failure to have notice and an opportunity to be heard, have been violated.

"It results that we find no error in the decree of the chancellor and it is affirmed" R. 157.

Petitioners state no reason why this Honorable Court should take jurisdiction in the instant case. It is urged by the petitioner that the Supreme Court of Tennessee by approving the case of *Morrow* v. *Fossick,* 71 Tennessee (3 Lea) 128, overrules *Sanders* v. *Armour Fertilizer Works,* 292 U. S. 190; 78 L. Ed. 1206, but these cases and the other cases cited on page 16 of the petition for certiorari are not in conflict, but the decisions are grounded on material differences in fact.

No reason exists for granting the writ in the sound judicial discretion of this Honorable Court under rule 38, subsection 5a. No Federal question of substance not heretofore determined by this Court is involved nor has the Supreme Court of Tennessee decided this case in a way not in accord with applicable decisions of this Court.

The question presented is one involving the asset of a Tennessee partnership on which one of the petitioners in conspiracy with the other sought to obtain judgment against two of the respondents herein by coming into the jurisdiction of Tennessee. It appears on the face of the petition for certiorari that the judgment of the Supreme Court of Tennessee complained of depended upon the previous decisions of the State Court and the judgment of the State Court in the case at bar did not depend upon the decision of a Federal question.

Statement of the Case.

Petitioners, in their summary of the substance of the pleadings and statement of the facts and in the questions presented, omit certain facts and circumstances which help to place the conduct of the parties in proper perspective. Accordingly respondents present the following brief summary of the case:

The undisputed record discloses that the respondent, Sherman, and the petitioner, Kopelove, were partners; that Sherman was a resident of Tennessee and Kopelove a non-resident of Tennessee but the partnership assets were in the State of Tennessee. See contract between Sherman and Kopelove as partners on the one hand and S. H. Robinson and Company, Inc., on the other hand filed as exhibit to answer and cross bill—Record pages 26-28.

Thereafter, the only asset of the partnership, consisting of the partnership contract with Lenoir Car Works, was sold to Robinson and a note was executed in the name of Kopelove (See Tr. page 67). Robinson tells the details of the transaction in his testimony. It appears that it was discussed at that meeting when the note was executed, which meeting was attended by Schear, Kopelove and Sherman, as well as Robinson, that Joe Sherman was a partner entitled to one-half of the proceeds of the note and that his one-half of the proceeds of the note would be paid over to him (R. pages 53 and 54). After the note had been executed under the circumstances which appeared in the proof, Robinson began paying the note on a monthly basis and paid off Two Thousand ($2,000.00) Dollars by checks (Record pages 64-66).

On November 7, 1942, the original bill was filed wherein Ralph Kopelove and Max Robinson were made parties defendant and the facts with reference to the partnership

agreement and the sale of the partnership asset to Robinson were set out in the bill (R. pages 1-6). This process was served on Robinson and a non-resident attachment notice for Kopelove published in the local newspaper.

On November 10, 1942, counsel for complainant notified Kopelove by letter advising him of the fact that a suit had been brought against him and on learning of the institution of suit Kopelove, accompanied by Schear, the other respondent, came to Knoxville on November 17, 1942, accompanied by their common attorney, Ralph Skilkin, to see the respondent, Sherman (R. pages 54, 61, 62, 63). They did not call on Sherman's lawyer, and failing to find Sherman in town, they talked to Robinson *and advised him that Kopelove still had the note* and wanted to settle with Sherman for One Thousand ($1,000.00) Dollars. As above stated, Sherman was not in town and then these three conspirators tried to employ a Knoxville lawyer, Max Morrison, who refused to handle the case.

On November 20, 1942, after the three conspirators had returned to Dayton, Ohio, Schear, acting through his attorney, Skilkin, entered the confessed judgment in Ohio (R. page 24).

On December 5, 1942, W. W. Piper, an attorney at Knoxville, wrote a letter to Robinson in which he said that the Dayton, Ohio, attorney for Ralph Schear (Skilkin) had sent him the note for collection (R. pages 66-68). He further states that when the papers were sent to him he learned "that Joe Sherman had brought suit in the Chancery Court at Knoxville against Ralph Kopelove and Max Robinson, seeking to attach by garnishment monies owing by Max Robinson to Ralph Kopelove, and see by the papers in court that an injunction was served upon Max Robinson alone and garnishment likewise served under an attachment" (R. page 67). Counsel for the petitioner is now undertaking

by assignments of error in this Court to convince the court that garnishment was not served under an attachment although he admits this was true in December of 1942. He likewise makes a compelling admission in this matter to the effect that it was not Kopelove's intention to appear in the Tennessee case (R. page 68). At this time counsel presumably was only representing Schear and that fiction was continued until finally the joint writ of error was filed in behalf of both petitioners herein in the Supreme Court of Tennessee and it is an inescapable fact that he was representing both of these conspirators as far back as December 3, 1942, and up until the present time.

On January 5, 1943, Ralph Schear filed a suit in the Second Circuit Court of Knox County against Max Robinson and S. H. Robinson and Company and as a basis for the action exhibited a copy of the note and made profert thereof and also sued on the purported confessed judgment entered on November 20, 1942 (R. page 24). This suit on the note was likewise filed in Knox County through the same attorney, Piper, and the declaration was in two counts, the first count suing on the purported confessed judgment, and the second count on the note itself (See Record page 24).

On March 1, 1943, Joe Sherman filed an amended and supplemental bill joining in as parties defendant, Ralph Schear and S. H. Robinson and Company (R. page 10). The complainant prayed that an injunction issue against Schear and be served upon his attorney and enjoining the said Schear from proceeding further in the suit in the Second Circuit Court against the Robinsons and to require the claim, if any, of said Schear, to be prosecuted in the Chancery Court in order to avoid a multiplicity of suits and so that justice may be done all the parties (R. 15). Immediate notice of the filing of this amended and supplemental bill was given to Attorney Piper on March 1, 1943

(R. page 45). However, on March 8, 1943, plaintiff, Schear, acting by and through his attorney, in violation of the injunction and in what was in effect a contempt of the Chancery Court process, undertook to enter a judgment by default in Tennessee for the amount of the note with interest and costs totaling Two Thousand Five Hundred Fifty-Eight Dollars and Thirty-Seven Cents ($2,558.37) (R. 35 and 36). While the Record apparently indicates that this judgment was entered on March 8, 1943, yet the answer of Jessie Marie Miller, the Circuit Court Clerk, indicates that it was not actually taken until March 9, 1943 (R. page 31), so it appears that Schear was undertaking to make the litigation in Tennessee a race of the swift and undertook to circumvent the jurisdiction of the Chancery Court by entering a default judgment against the Robinsons who were then seeking the protection of the Chancery Court by the filing of an answer and cross bill which they did file on March 10, 1943 (R. page 20). The default judgment did not help Schear in any way since it would have been necessary for the parties filing the bill of interpleader to confess judgment in the Circuit Court case. In the cross bill the respondents, S. H. Robinson & Company, and Max Robinson, prayed that Ralph Schear by and through his Attorney, Piper, be forthwith enjoined from prosecuting his suit against them in the Second Circuit Court for Knox County, Tennessee, further than to judgment and that Schear be required to come into the Chancery Court and establish his claim to the fund in question (R. page 25). On April 6, 1943, the attorney for Schear and Kopelove undertook to file what was denominated an answer for the Circuit Court Clerk (R. pages 31-34).

Undertaking to answer the bills filed in the Chancery Court in this manner, Schear and Kopelove, through their attorney, made all the defenses which they undertook to set

up in the writ of error to the Tennessee Supreme Court. The same suggestion which had been made in Piper's letter of December 5, 1942, appears in the purported answer of Jessie Marie Miller (R. page 34). Piper in his letter of December 5th had suggested to the Robinsons how the Robinsons should answer this suit brought against them (R. page 68). However, in a consideration of this case the special facts touching upon the case at Bar must be kept in mind. The note in question, which was the only asset of the partnership, had been executed in the name of Kopelove and was signed by Robinson. It was discussed at the time of the execution of the note and agreed in the presence of Schear, Kopelove, Sherman and Robinson, that Joe Sherman was a partner entitled to one-half of the proceeds of the note and it was understood and agreed between all of the parties including the garnishee, Robinson, that Sherman's one-half of the proceeds of the note would be paid over to him (R. page 62). It was for this reason that Robinson was unable to take the short cut out of this lawsuit which the attorney for the joint petitioners undertook to get him to do in the letter written by the attorney on December 5, 1942. Knowing all of the facts as he did Robinson could not have answered the garnishment against him as suggested by Piper. Piper had suggested to him that "your answer in the Kopelove suit should be that you owe a note but that it is a negotiable note and hence that you do not owe the payee, but the holder and owner—and in this case, you know that such note was endorsed by Kopelove to Schear, and that Schear is the owner" (R. page 68). In other words, Piper had been misinformed by his clients, Schear and Kopelove, as to what took place and the suggestion made by him which he wanted Robinson to adopt as an answer simply was not the truth. As we have said, while Piper was evidently misinformed by Schear and

Kopelove, yet Robinson knew what the true facts surround ing the transaction were. Purporting to act as attorney fo the Circuit Court Clerk, the attorney representing Kope love and Schear became actively engaged in the Chancer Court litigation, filing several motions and notices (R. page 36, 37) and on April 9, 1943, after the amended and sup plemental bill had been filed by Sherman (R. page 39) th record discloses that the Attorney for Kopelove an Schear filed a motion to have the answer of the Circui Court Clerk treated as a petition to dissolve the injunctio (R. page 45). On April 8, 1943, a second amended and sup plemental bill was filed by Sherman (R. page 39) wherei it was alleged that the defendant, Schear, had filed a suit i the Second Circuit Court wherein he sought to claim owner ship of the partnership property in question and complain ant showed to the court that Schear had no interest in th note, but if he had any interest therein it would be in con nection with that portion of the note or that interest therei which was the property of the defendant, Kopelove, an if Schear did, in fact, purchase Kopelove's interest in th note that he took same with the full knowledge of the prio equities of Sherman and that such transfer of the note fro Kopelove to Schear would not operate to defeat Sherman' rights. That Schear is the brother-in-law of Kopelove that Schear and Kopelove have a common attorney, on Ralph Skilkin, and that Schear was present at the time th transaction was entered into between Max Robinson on th one hand and Sherman and Kopelove on the other (R. pag 40).

The second amended and supplemental bill furthe averred that since the filing of the original bill and the firs amended and supplemental bill that the balance due o the note representing the partnership asset was paid int the Registry of the Chancery Court by the bill of inte

pleader, and since the fund in controversy had thus been paid into the Chancery Court it is proper for Sherman to again come into Court by the second amended and supplemental bill and pray that the fund be held subject to the further orders of the Court and if proper that another attachment issue to be levied on the individual interests of the debtors in the fund. It was further averred that Sherman now had a further ground for the attachment of the proceeds by reason of the fact that the subject matter of the suit, i. e., the money attached, is impounded in the Chancery Court, in which Court the bill was originally filed and since the money is impounded in Court the necessity for a formal attachment was dispensed with (R. page 41). The bill prayed for publication for the two defendants and the Chancellor on April 8, 1943 (R. page 43) by fiat directed the Clerk and Master to hold the funds in Court and to attach them in his hands and to make publication for Schear and Kopelove as provided by law in attachment cases (R. page 43). Publication was again made for Kopelove and was made for the first time as to Schear (R. page 43, 44). On April 17, 1943, the Chancellor, having examined the pleadings and heard the argument of counsel with Attorney Piper participating therein among the other attorneys interested in the case, was of the opinion that the Circuit Court Clerk was not a proper party to make the defenses insisted upon by counsel purporting to act for her, and accordingly struck said motion to dissolve the injunction from the record (R. pages 46, 47). Thereupon, counsel representing Schear and Kopelove, but purporting to represent the Circuit Court Clerk, excepted and prayed an appeal to the Supreme Court of Tennessee, but provided that the appeal was denied (R. page 47). This order whereby counsel for Schear and Kopelove undertook to preserve exceptions in the name of the Clerk was entered on April 20, 1943 (R. page 47) and, therefore, it appears

indisputably from the transcript of the proceedings below that counsel for Schear and Kopelove, who is representing these petitioners in this Honorable Court, had full and complete knowledge and information about the case at bar from December 3, 1942, as indicated in the Piper letter of December 5, 1942 (R. pages 66-68), on through the time of the entry of the final decree and was actively engaged in the litigation in one guise or another during the entire period of eight or nine months while the litigation was progressing to final judgment in the Chancery Court.

In commenting on the facts appearing in the Record the Supreme Court of Tennessee observed in the Opinion filed on January 8, 1944, that the respondent, S. H. Robinson & Company, purchased the partnership contract from Sherman and Kopelove for $4500.00 represented by a note payable to Kopelove and this note was executed in the presence of Max Robinson, Sherman, Kopelove and Schear (R. 155). The Supreme Court further finds that complainant, Sherman, filed his bill in the Chancery Court on November 7, 1942, seeking to attach the balance of the money owed by Robinson to the partnership. The Court further said:

> "Thereupon the defendant Kopelove and his attorney made a trip to Knoxville to see Robinson about the settlement of the balance, and told Robinson that he (Kopelove) would settle with Sherman. Robinson testified that Kopelove and Sherman were partners.
>
> Not being able to see Sherman, Kopelove, his attorney, and his brother-in-law, Schear, returned to Ohio, and Schear, claiming that he had purchased the note from Kopelove, obtained a confessed judgment in Ohio. Then Schear, through his attorney at Knoxville, W. W. Piper, instituted a suit in the Circuit Court of Knox County on the foreign judgment and also on the note. S. H. Robinson & Company, Incorporated, then filed an answer and a bill of interpleader, and paid the amount of the note, approximately $2500, into the registry of the court.

> Thereupon Sherman filed an amended and supplemental bill attacking the transfer of the note as a fraud and made Schear a party defendant. Publication was duly made for Kopelove and Schear, and written notice of the suit was served on Mr. Piper, Schear's attorney of record in the suit in the Circuit Court." *Record pages 155-156.*

The petitioners in this Court filed a writ of error in the Supreme Court of Tennessee. The writ of error was filed not only for the purpose of testing the jurisdiction of the Chancery Court but also contained assignments of error which went beyond a mere attack on the jurisdiction of the Court and questioned the decree of the Chancellor on its merits. In the brief filed by Kopelove in the Supreme Court of Tennessee the last paragraph of assignment of error No. 5 went to the merits of the case (R. page 98). Likewise assignments 6, 7, 8 and 9 were not confined to the question of jurisdiction alone but questioned the action of the Learned Chancellor in awarding a judgment in excess of Twenty-Five Hundred ($2500.00) Dollars and in allowing an attorney's fee on the bill on interpleader in assignment No. 7, in failing to award interest on the note from November 1, 1942, in assignment No. 8 and in taxing as a part of the costs certain expense items incident to taking the depositions in assignment No. 9. (See Record page 98.) It, therefore, appears that these parties who filed the writ of error in the Supreme Court of Tennessee and who are petitioning for the writ of certiorari in this Honorable Court entered a general appearance in the Supreme Court of Tennessee and for this additional reason are not entitled to the granting of the writ.

Argument.

Summary of the Argument.

POINT A. Kopelove and Schear are proven conspirators to defraud Sherman by a fraudulent transfer of the note to Schear. Can Schear, a party to the fraud, enter a Tennessee Court in Knox County, the home of the respondents, invoke the aid of the Courts of Tennessee by suing at law on the note thus fraudulently obtained, and leave the Chancery Court of Tennessee powerless to protect the residents of Tennessee and prevent the perpetration of the fraud because of the mere fact of non residence of the defrauding parties?

POINT B. Kopelove and Sherman by filing the writ of error in the Tennessee Supreme Court and filing assignments going to the merits of the case as well as to the question of jurisdiction entered a general appearance and thereby conferred jurisdiction on their persons.

POINT C. Under Tennessee law the power or authority to confess judgment before an action is instituted is void and also under Tennessee law if the laws of a foreign state are not introduced in evidence, pleaded or at least proven in the lower Court, the law of Tennessee will govern and the presumption is that the law is the same as the law of Tennessee so far as they bear on the subject.

POINT A.

Schear by bringing suit in the Knox County Circuit Court as a part of the conspiracy with Kopelove was using the Tennessee Court for the purpose of furthering his fraud and to deny the jurisdiction of the Court of Equity under such a set of facts would be a denial of due process to the resident suitors, Sherman and Robinson. In support of the

foregoing point we respectfully call the Court's attention to the fact that the note signed by the Robinsons represented the sole asset of a Tennessee partnership composed of Sherman, a citizen of Tennessee, and Kopelove, a citizen of Ohio. Kopelove fraudulently transferred the note to Schear and at the time of the filing of the cross bill and interpleader by Robinson, the stake-holder, the original note had been proffered in the law cause in the Knox County Circuit Court, the prosecution of which had been enjoined and the proceedings in that suit were brought into the Chancery Court, so that the final decree of the Chancery Court operated as a cancellation of the note (Record page 73).

The case has been thoroughly litigated in the Courts of Tennessee, and as already stated, there is no substantial Federal question.

We believe that this Court will have no difficulty in finding from an inspection of all the pleadings, the process, the various appearances, publication notices and attachments, that the fund in question was in the custody of the Court not only under the statutory provisions relating to attachments but under the powers incident to the issuances of the extraordinary process by the Chancery Court. There is no showing on the part of the defendants that there has been any fraud or any advantage taken of them, but on the other hand the Record discloses that the petitioners in this Court are guilty of fraud and a conspiracy and did not come into the Tennessee Supreme Court with clean hands. (See Opinion Supreme Court of Tennessee, Record, page 157.) All of the questions raised by the petitioners herein in regard to the sufficiency of the attachment writs, publication notices and other process in Tennessee, were thoroughly gone into by the Tennessee Supreme Court and present no Federal question and the record shows a careful and substantial compliance with

the laws regarding attachments, publication notices, etc. The attachment laws of Tennessee are liberally construed. (Gibson's Suits in Chancery, sec. 878.)

POINT B.

When Kopelove and Sherman filed the Record for writ of error in the Tennessee Supreme Court they filed assignments of error going to the merits of the case as well as to the question of jurisdiction and thereby entered a general appearance and conferred jurisdiction on their persons.

In support of this point it is the respectful insistence of the respondents herein that in the Tennessee Supreme Court in the Kopelove brief the last paragraph of assignment of error Number 5 went to the merits of the case as did assignments 6, 7, 8 and 9 (see Record page 98). We submit that such an appearance is not special but is general, and where the defendant in addition to attacking the attachment writs also asks for other relief which can be granted only on the hypothesis that the Court has jurisdiction of the cause and person, the appearance is general and confers jurisdiction over the person (3 American Jurisprudence, pages 796, 797, 799). This is likewise the holding of the Supreme Court of Tennessee in the case of *Taylor* v. *Sledge*, 110 Tennessee, page 263.

Quoting in part from this case the Tennessee Court said:

> "We are, therefore, of the opinion that the complainant entered his appearance in the former case when he sued out the writs of error and supersedeas; that this Court thereby obtained jurisdiction of his person and its judgment against him is valid and conclusive of the matters therein adjudged although the original summons may not have been served upon him" *Taylor* vs. *Sledge*, *Supra*, page 268.

We are insisting upon the applicability of this point in the case at Bar because as pointed out in the statement of

the case the assignments of error of Kopelove and Schear were directed not only to the jurisdictional question but to matters involving the merits of the controversy.

POINT C.

It is respondents insistence that the laws of a foreign state if not introduced in evidence, pleaded or at least proven in the lower Court are presumed to be the same as the laws of Tennessee so far as they bear on the subject.

It was Schear's insistence in the Supreme Court of Tennessee that the rendition of the confessed judgment in Dayton, Ohio, was in conformity with the laws of Ohio regulating negotiable instruments and that Schear was the owner of the note by lawful negotiation. That Schear was the owner by lawful negotiation was denied by Sherman and, of course, goes to the merits of the case and is another indication of the fact that Schear and Kopelove by their assignments of error generally entered their appearance in the Tennessee Supreme Court. The Tennessee Supreme Court had no difficulty under the Record in finding that Schear and Kopelove were conspiring to defraud Sherman and the Courts of Tennessee reached a correct result. Under section 8848 of Williams 1932 Code any power or authority to confess judgment given before an action is instituted and before the service of process in such action is void and a judgment passed on such authority is likewise declared void. It is too well settled to require citation of authority that if the laws of a foreign state were not introduced in evidence, pleaded or at least proven in the lower Court, the laws of Tennessee will govern. See *Watkins* v. *Watkins*, 160 Tenn. 1, 10; *Flooring Co.* v. *Old Dominion Table Works*, 163 Tenn. 532, 534; *Bagwell* v. *McTighe*, 85 Tenn. 616.

The presumption is, in the absence of such formal proof in the trial Court, that the laws are the same as our own

so far as they bear on the subject. *North Memphis Savings Bank* v. *Union Bridge and Const. Co.*, 138 Tenn. 161, 193-194.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied. And, finally, the insistence made in petitioners brief that a money judgment was rendered against Kopelove is incorrect. The decree of the Chancery Court closely followed the form set out in *Higgins & Crownover's Tennessee Procedure, page 883, section 2250.* It is proper in the decree to recite the full amount of the judgment as shown by the proof; however, in the Tennessee form book alluded to, the judgment or decree recited that no execution would issue for the full amount of the judgment, and it is to be noted that in the Chancellor's decree no execution was awarded against Kopelove (See Record page 72).

The settled principles of Tennessee law as applied to the issues peculiar to the case at Bar control the acts of the Tennessee Court. There is certainly no intrinsic importance in the issues involved in this case requiring determination by the most authoritative Court in the land.

We respectfully call to the attention of the Court that counsel representing the respondents, Max Robinson and S. H. Robinson & Company, in the State Court, is now in the armed forces and it being a matter of joint interest of all respondents to secure a denial of the petition, this joint response is filed on behalf of all respondents.

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